

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(LAND DIVISION)**

**CIVIL SUIT NO. 1068 OF 2020**

- 1. STEPHEN MUBIRU  
2. NABANOBA CHRISTINE MUBIRU :::::::::::::::::::::::::::::::::::PLAINTIFFS**

***VERSUS***

- 1. TWAHA SEMAKULA *alias* KALI SMART  
2. BAKASAMBE GEOFFREY :::::::::::::::::::::::::::::::::::DEFENDANTS**

**BEFORE: HON. JUSTICE BERNARD NAMANYA**

**JUDGMENT**

**Introduction:**

1. The plaintiffs brought this suit by way of ordinary plaint against the defendants for: a) an order of eviction/vacant possession of land comprised in Busiro Block 462 Plots 410, 411 & 412 (“the suit land”); b) a permanent injunction restraining the defendants, their servants or agents from further acts of trespass; c) general damages for trespass to land; d) mesne profits; e) interest on the awards in (c) and (d) above at court rate from the date of judgment until payment in full; and f) costs of the suit.

**Background:**

2. According to paragraph 4 of the plaint, the plaintiffs’ cause of action arose as follows:



- a) By agreements dated 29<sup>th</sup> May 2012, the plaintiffs purchased the suit land from Jomayi Property Consultants Ltd;
  - b) Following the purchase, certificates of title for Plots 410 and 412 were transferred into the 2<sup>nd</sup> plaintiff's name;
  - c) The process of registering the 1<sup>st</sup> plaintiff on the certificate of title for Plot 411 is still underway;
  - d) Following the purchase, the plaintiffs jointly took possession of the three plots of land and began undertaking agricultural activities on the land;
  - e) Without any claim of right or lawful excuse whatsoever, during or around the month of June 2020, the defendants jointly and /or severally took possession of parts of the said three plots, fenced them off with poles and barbed wire and undertook agricultural activities thereon; and
  - f) The defendants ignored the plaintiffs' protestations and demands to vacate the suit land.
3. The 1<sup>st</sup> defendant (Twaha Semakula *alias* Kali Smart) did not enter appearance despite being served and the case proceeded ex parte against him pursuant to *Order 9 rule 11* of the *Civil Procedure Rules (SI-71-1)*.
4. The 2<sup>nd</sup> defendant filed his written statement of defence in which he stated as follows:
- a) That he owns land away from the suit land claimed by the plaintiffs and called for a survey report to determine where plaintiffs' plots are located. According to him, the plaintiffs' plots are not located where they claim to be;
  - b) That before the plaintiffs bought the suit land, the land used to belong to the 2<sup>nd</sup> defendant's father, a one late Kigundu Francis and the land was



comprised in Busiro Block 462 Plot 191 land at Bukomye measuring 33.250 hectares and later the land was transferred into the names of the 2<sup>nd</sup> defendant;

- c) That out of this land, the 2<sup>nd</sup> defendant sold 10.00 acres to Mulindwa Robert who fraudulently transferred the entire land to Jomayi Property Consultants Ltd; and
- d) That the 2<sup>nd</sup> defendant denied that he has encroached on the suit land and that he has never fenced off the plaintiffs' land.

**Representation:**

- 5. At the hearing of the suit, the plaintiffs were represented by *Mr. Bazira Anthony of M/s Byenkya, Kihika & Co. Advocates* while the 2<sup>nd</sup> defendant was represented by *Mr. Charles Mbogo of M/s Mbogo & Co. Advocates*.

**The plaintiff's evidence:**

- 6. The plaintiffs produced 3 (three) witnesses to prove their case. PW1 (Stephen Mubiru), PW2 (Christine Mubiru Nabanoba), and PW3 (Isabirye Zacharia). The court appointed a surveyor, Meridian Surveyors, who tendered in their report (Exh.P12).
- 7. The plaintiff adduced evidence of the following documents that were exhibited:
  - i). Exh.P1 – Sale agreement for Busiro Block 462, Plot 411, measuring 12 decimals between Stephen Mubiru and Jomayi Property Consultants Ltd dated 29<sup>th</sup> May 2012;
  - ii). Exh.P2 – Sale agreement for Busiro Block 461 Plots 410 and 412 between Nabanoba Christine and Jomayi Property Consultants;





- iii). Exh.P3 – Receipts of payment by Stephen Mubiru to Jomayi Property Consultants Ltd dated 29<sup>th</sup> May 2012, 5<sup>th</sup> June 2012, 8<sup>th</sup> August 2012 and 21<sup>st</sup> January 2013 for Busiro Block 462 Plot 411;
- iv). Exh.P4 – Receipts of payment by Nabanoba Christine Mubiru to Jomayi Property Consultants Ltd dated 29<sup>th</sup> May 2012, 5<sup>th</sup> June 2012, 8<sup>th</sup> August 2012 and 21<sup>st</sup> January 2013 for Busiro Block 462 Plots 411, 412 and 410;
- v). Exh.P5 – Executed Transfer Form for Busiro Block 462 Plot 411 between Stephen Mubiru and Jomayi Property Consultants Ltd;
- vi). Exh.P6 – Title deed to Busiro Block 462 Plot 411, purchased by Stephen Mubiru from Jomayi Property Consultants Ltd;
- vii). Exh.P7 – Title deed to Busiro Block 462 Plot 410, purchased by Nabanoba Christine Mubiru from Jomayi Property Consultants Ltd;
- viii). Exh.P8 – Title deed to Busiro Block 462 Plot 412, purchased by Nabanoba Christine Mubiru from Jomayi Property Consultants Ltd;
- ix). Exh.P9 – Photos showing physical trespass on to the land comprised in Busiro Block 462 Plot 410, 411 and 412;
- x). Exh.P10 – Police reference number and police report indicating trespass onto the land comprised in Busiro Block 462, Plots 410, 411 and 412;
- xi). Exh.P11 – Certificate of title for Busiro Block 462 Plot 411; and
- xii). Exh.P12 – Survey Letter dated 5<sup>th</sup> May 2022.

**The defendant's evidence:**

8. The 2<sup>nd</sup> defendant failed to file witness statements and a trial bundle as ordered by court. The 2<sup>nd</sup> defendant's prayer to file witness statements and a trial bundle after cross examining the plaintiffs and their witnesses was rejected by court



under the provisions of *Order 18 rules 5A (1), (6) & (7) of the Civil Procedure Rules (as amended by S. I No. 33 of 2019)*.

**Locus in quo visit:**

9. Court conducted a locus in quo visit to the suit land on the 27<sup>th</sup> January 2023 in the presence of Mr. Bazira Anthony (counsel for the plaintiffs), Mr. Charles Mbogo (counsel for the 2<sup>nd</sup> defendant), Mr. Stephen Mubiru (the 1<sup>st</sup> plaintiff), Mr. Isabirye Zakaria (plaintiffs' witness), Ms. Aisha Nagawa (surveyor) and Mr. Bakasambe Geoffrey (the 2<sup>nd</sup> defendant).
10. The 1<sup>st</sup> plaintiff, Mr. Stephen Mubiru showed court the location of the suit land, the extent of encroachment by the defendants and the current developments on the land. He informed court that sometime in 2020, someone started construction on the suit land without his authority. He obtained an injunction and the construction stopped.
11. Court observed that there is an incomplete building on Plot 412, a foundation for a building on Plot 411, and a dry maize garden on Plot 411.

**Issues to be determined by the court:**

12. The plaintiffs framed the following issues for court's determination:
  - i). Whether the defendants are trespassers on the plaintiffs' land?
  - ii). What remedies are available to the plaintiffs if any?





**Parties' submissions:**

13. Briefly, counsel for the plaintiffs submitted that in 2020, without any permission or consent from the plaintiffs, the defendants interfered with their possession and fenced off the suit land with poles and barbed wire. Counsel referred to the case of E.M.N Lutaaya v. Stirling Civil Engineering, Civil Appeal No.11 of 2002 where court held that trespass to land occurs when a person makes an unauthorized entry upon another's land and thereby interfering with another person's lawful possession of the land. He also referred to the Court of Appeal case of Sheik Muhammed Lubowa v. Kitara Enterprise Ltd C.A No.4 of 1987 where court highlighted the essential elements to prove in a case of trespass which include: i) that the disputed land belonged to the plaintiff; ii) that the defendant had entered upon it and iii) that the entry was unlawful in that it was made without permission or that the defendant had no claim or right or interest in the disputed land.
14. Briefly, counsel for the 2<sup>nd</sup> defendant submitted that the instant suit ought to be merged with Civil Suit No. 404 of 2016: Sserulata Livingstone Mugerwa v. Jomayi Property Consultants Ltd. Counsel for the 2<sup>nd</sup> defendant further submitted that the 2<sup>nd</sup> defendant owns a Kibanja interest in the suit land and that if the plaintiffs had carried out due diligence on the suit land before purchase, they would have established the 2<sup>nd</sup> defendant's Kibanja interest in the suit land. He submitted that in view of the 2<sup>nd</sup> defendant's Kibanja interest in the suit land, he is not a trespasser on the land. He relied on the cases of Haji Abudu Sadala v. Salamasida, H.C.C.A No. 1 of 1988 (Jinja); Misaki Bakintuma & Anor v. John Bosco Muwonge & Anor, H.C.C.S No. 236 of 2014 (Land Division-Kampala); Naome Juma & Anor v. Nantume Ruth & Anor,



H.C.C.S No. 363 of 2010 (Land Division-Kampala); and Namugaya Waibi Annet v. Nakiranda Alisat, H.C.C.A No. 3 of 2015 (Jinja).

**Preliminary matters:**

15. Before I delve into the discussion of the issues, I wish to consider and dispose of, the issue of consolidation of the instant suit with Civil Suit No. 404 of 2016: Sserulata Livingstone Mugerwa v. Jomayi Property Consultants Ltd. I wish to emphasise that during the hearing of the suit, the 2<sup>nd</sup> defendant did not raise the issue of consolidation of the suits. It was only raised at the stage of written submissions pending delivery of the judgment.
16. Consolidation of suits is governed by Order 11 of the Civil Procedure Rules, and under sub-rule 2, an application for consolidation of suits shall be by summons in chambers. Apart from the matter of consolidation of suits being raised late in the proceedings to the prejudice of the plaintiffs, the 2<sup>nd</sup> defendant failed to file a chamber summons application for consolidation of the suits as required by the rules. The pleadings in Civil Suit No. 404 of 2016: Sserulata Livingstone Mugerwa v. Jomayi Property Consultants Ltd have not been availed to me to enable me determine whether the two suits raise similar questions of law or fact.
17. It is my decision therefore, that the prayer for consolidation of the suits has not been brought in accordance with the rules of procedure, is improperly before me and is accordingly disallowed.





**Issue No. 1: Whether the defendants are trespassers on the plaintiffs' land?**

18. The plaintiffs have a burden of proof to adduce evidence on the balance of probabilities, that the defendants are trespassers on the suit land. *Section 102* of the *Evidence Act (Cap 6)* provides that:

***“102. On whom burden of proof lies***

*The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”*

19. The *Supreme Court of Uganda* in the case of *Senkungu & 4 Ors v. Mukasa (Civil Appeal 17 of 2014) [2017] UGSC 14 (per Augustine S. Nshimye, J.S.C)* held that:

*“In civil trials, the burden of proof is the obligation to present evidence on the subject of the law suit; that is, to prove or disprove a disputed fact.”*

20. In summary, the plaintiffs adduced the following evidence to prove their case:

- i). PW1 (Stephen Mubiru) testified that he has an equitable interest in property comprised in Busiro Block 462 Plot 411 measuring 0.048 hectares and the process of registration into his names is underway at Wakiso land office. That by an agreement dated 29<sup>th</sup> May 2012, he bought the suit property at a consideration of UGX 8,150,000 from Jomayi Property Consultants which was fully paid. That at the time of the said purchase, the said plot formed part of the recently levelled expanse of land sub-divided into more than fifty plots of more or less the same size planned to be developed into a housing estate. That upon





completing the purchase price, he took possession of the suit land and began cultivating maize thereon. The maize cultivated on the land yields about 4 sacks of maize combined per season (1 sack is 100kg selling at UGX1,000) thus fetching about UGX 500,000. That he enjoyed quiet possession of the suit land since May 2012. However, without any lawful excuse, during or around the month of June 2020, the defendants purportedly took possession of some parts of the suit land by fencing them off with poles and barbed wire and also undertook agricultural activities thereon. That he managed to send away the defendants and their agents from the suit land using the area police and local authorities, but they keep interfering with the suit property by sending various potential buyers to inspect the land. This has on a number of occasions forced him to make complaints at Nsangi police station for purposes of securing his land. That he is currently in possession of the said land and the defendants do not have possession.

- ii). PW2 (Christine Mubiru Nabanoba) testified that she is the registered owner of land comprised in Busiro Block 462 Plots 410 and 412 measuring approximately 0.050 hectares and 0.54 hectares respectively. That she purchased the land at a consideration of UGX 14,582,590 from Jomayi Property Consultants, which was fully paid and the land transferred into his names. That at the time of the said purchase, the said plot formed part of the recently levelled expanse of land sub-divided into more than fifty plots of more or less the same size planned to be developed into a housing estate. That upon completing the purchase price, she took possession of the suit land and began cultivating maize thereon. The maize cultivated on the land yields about 4 sacks of maize



combined per season (1 sack is 100kg selling at UGX1,000) thus fetching about UGX 500,000. That she enjoyed a quiet possession of the suit land since May 2012. However, without any lawful excuse, during or around the month of June 2020, the defendants took possession of some parts of the suit land by fencing them off with poles and barbed wire and also undertook agricultural activities thereon. That she engaged the police and area local authorities who managed to send away the defendants and their agents from the suit land. That the defendants keep interfering with the suit land by sending various purported potential buyers to inspect the land. This has on a number of occasions forced her to make complaints at Nsangi police station for purposes of securing her land. That she is currently in possession of the said land and the defendants do not have possession.

iii). PW3 (Isabirye Zacharia) testified that he used to be an employee of Jomayi Property Consultants. He took the plaintiffs to inspect the land prior to purchase and the land was vacant with no one settled on it. It was also recently cleared and graded. He testified that no other person owned the suit land other than Jomayi Property Consultants.

21. According to the *Supreme Court of Uganda* in the case of ***Justine E. M. N. Lutaya v. Stirling Civil Engineering Company Ltd, Civil Appeal No. 11 of 2002 (per Mulenga, J.SC)***:

*“Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against*





*the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass [...] Where trespass is continuous, the person with the right to sue may [...] exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended [...] For purposes of the rule, however, possession does not mean physical occupation. The slightest amount of possession suffices [...] legal possession is vested in the holder of a certificate of title to the land. In the event of trespass, the cause of action accrues to that person, as against the trespasser [...] by virtue of her certificate of title, the appellant had legal possession of the suit land, and therefore, the capacity to sue in trespass [...]"*

22. In the case before me, the plaintiffs adduced evidence to prove that they have legal possession of the suit land. Exh.P5 is the executed Transfer Form for Busiro Block 462 Plot 411 between Stephen Mubiru and Jomayi Property Consultants Ltd. Exh.P6 is the certificate of title for Busiro Block 462 Plot 411, purchased by Stephen Mubiru from Jomayi Property Consultants Ltd; Exh.P7 is the certificate of title for Busiro Block 462 Plot 410, in the names of Nabanoba Christine Mubiru from Jomayi Property Consultants Ltd; Exh.P8 is the certificate of title for Busiro block 462 Plot 412 in the names of Nabanoba Christine Mubiru.
23. I am satisfied that the plaintiffs have legal possession of the suit land, and therefore capacity to sue in trespass. I am also satisfied that the evidence adduced by the plaintiffs proves on the balance of probabilities, that the





defendants, around the month of June 2020, made an un-authorised entry into the suit land which is owned by the plaintiffs.

24. It was argued for the 2<sup>nd</sup> defendant that he owns a Kibanja interest in the suit land. I have perused the 2<sup>nd</sup> defendant's written statement of defence and nowhere is it claimed that the 2<sup>nd</sup> defendant owns a Kibanja interest in the suit land. I agree with the submissions of counsel for the plaintiffs that the 2<sup>nd</sup> defendant's plea of owning a Kibanja interest in the suit land is a departure from the 2<sup>nd</sup> defendant's pleadings, and on this ground alone, the plea ought to fail.
25. However, I will briefly discuss the burden of proof on the 2<sup>nd</sup> defendant in respect of his alleged Kibanja interest vis-à-vis the evidence before me.
26. According to the Supreme Court case of *George Tuhirirwe v Carolina Rwamuhanda (Supreme Court Civil Appeal 15 of 2007)*, a Kibanja holder or a customary tenant is a person who had settled on land with the consent of the mailo (registered) land owner. A Kibanja holder is said to hold an equitable interest in mailo land which can be transferred with consent of a registered owner.
27. A person who claims to be a Kibanja holder/customary tenant has to adduce some form of evidence to prove the existence of a relationship with the registered mailo land owner. It must be demonstrated that indeed the Kibanja holder / customary tenant has settled on the land with the consent of the registered mailo land owner. A Kibanja holder / customary tenant enjoys protection under the law as either a lawful or bona fide occupant.



28. To be able to obtain the protection accorded by the law, the 2<sup>nd</sup> defendant is required by the law to adduce evidence pursuant to the provisions of *Section 101 (1) of the Evidence Act (Cap 6)* to satisfy court that he is a lawful occupant or bona fide occupant (Kibanja holder / customary tenant) as defined under *Sections 29 (1) & (2) of the Land Act (Cap 227) (as amended)*. The defendant has a burden to prove that he holds a Kibanja interest on the suit land or that he is a lawful or bona fide occupant. The 2<sup>nd</sup> defendant did not adduce any evidence at all to prove that he owns a Kibanja interest in the suit land.
29. The evidence adduced by the plaintiffs proves that the defendants are trespassers on the suit land. The evidence adduced by the plaintiffs was not rebutted by the defendants. I am satisfied that the plaintiffs have discharged their burden of proof.
30. Issue No.1 is therefore answered in the affirmative.

**Issue No. 2: What remedies are available to the plaintiffs if any?**

31. The plaintiffs prayed for the following reliefs:
- a) an order of eviction/vacant possession of land comprised in Busiro Block 462 Plots 410, 411 & 412 ("the suit land");
  - b) a permanent injunction restraining the defendants, their servants or agents from further acts of trespass;
  - c) general damages for trespass to land;
  - d) mesne profits;



- e) interest on the awards in (c) and (d) above at court rate from the date of judgment until payment in full; and
  - f) the costs of the suit.
32. The plaintiffs submitted they have been deprived of the use and enjoyment of their land as a result of the actions of the defendants. Indeed when court visited locus in quo, it was observed that the defendants and / or their agents had started construction of buildings on the land until they were stopped by the plaintiffs. The plaintiffs are entitled to receive compensation from the defendants for the hardship, inconvenience and suffering that they have caused to the plaintiffs.
33. Counsel for the plaintiffs prayed for an award of UGX 80,000,000 in general damages, which I consider to be excessive.
34. To compensate the plaintiffs for the hardship, inconvenience and suffering that has been occasioned to them at the hands of the defendants, I award UGX 20,000,000 to the plaintiffs as general damages to be paid by the defendants jointly and/or severally.
35. Counsel for the plaintiffs prayed for mesne profits and prayed for an award of UGX 20,000,000. According to *LexisNexis Legal Glossary*, mesne profits are damages suffered by a landlord who is kept out of possession of the land by a trespasser. It is an amount payable by a person in possession or occupation of land in circumstances when that person has no right to be in possession or occupation. Mesne profits are the monies payable by the person in possession or occupation to the person who has a better right to possess or occupy. They





are calculated as the value of remaining in possession or occupation for the relevant period.

36. According to the evidence before me, the plaintiffs have been in possession of the suit land save for the time when the defendants made an unauthorised entry into the land.
37. It is my decision therefore, that the plaintiffs are not entitled to mesne profits since they have been in possession of the suit land from the time of purchase.
38. Counsel for the plaintiffs prayed for interest of 12% per annum on general damages which I consider to be reasonable. It is accordingly awarded.
39. According to section 27 of the Civil Procedure Act (Cap 71), costs follow the event. Since the suit against the defendants has succeeded, the plaintiffs are awarded costs of the suit.

**Conclusion:**

40. In the result, I enter judgment in favour of the plaintiffs and grant the following reliefs:
  - 1) An order of eviction/vacant possession against the defendants or anyone claiming to have acquired interest in the suit land from the defendants in respect of land comprised in Busiro Block 462 Plots 410, 411 & 412 Land at Bukomye;
  - 2) A permanent injunction restraining the defendants, their servants, successors in title or agents or any one claiming to have acquired interest



- in the suit land from the defendants from further acts of trespass on land comprised in Busiro Block 462 Plots 410, 411 & 412 Land at Bukomye;
- 3) An order for payment of general damages of UGX 20,000,000 (Uganda shillings twenty million only) to be paid by the defendants jointly and/or severally;
  - 4) An order for payment of interest of 12% per annum on general damages from the date of judgment until payment in full; and
  - 5) An order for payment of costs of the suit by the defendants jointly and/or severally.

**I SO ORDER.**

  
**BERNARD NAMANYA**  
**JUDGE**  
*17<sup>th</sup> March 2023*

17 March 2023 at 09.27am.

Mr. Bazira Anthony of M/s Byenkya, Counsel for the plaintiffs  
Kihika & Co. Advocates

Mr. Charles Mbogo of M/s Mbogo & Counsel for the 2<sup>nd</sup> defendant  
Co. Advocates.

Winnie Nabule Court Clerk

**Mr. Bazira Anthony:**

The matter is for Judgment. We are ready to receive the Judgment.

**Court:**

Judgment delivered in open chambers.

  
BERNARD NAMANYA

JUDGE

17<sup>th</sup> March 2023